

**COMMENTS OF THE CIVIL WAR PRESERVATION TRUST ON THE FCC'S
PROPOSED PROGRAMMATIC AGREEMENT STREAMLINING THE
SECTION 106 PROCESS FOR CERTAIN UNDERTAKINGS
(DOCKET NO. 03-128) AUGUST 7, 2003**

OVERVIEW:

The Civil War Preservation Trust (CWPT), with 45,000 members the nation's largest organization devoted exclusively to the preservation of the hallowed ground of Civil War battlefields, appreciates the opportunity to comment on the proposed "Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission (Docket No. 03-128)".

The goal of the proposed Programmatic Agreement (PA) is to streamline the Section 106 process under the National Historic Preservation Act of 1966 (NHPA) for the siting of certain wireless and broadcast communication facilities, including those commonly termed "cell towers".

CWPT supports the streamlining goal, as long as historic properties are continued to be afforded the protection authorized by the NHPA. Therefore, our comments focus on enhancing public participation and review in cell tower siting decisions, and embodying the current appeal procedures when the State Historic Preservation Officer (SHPO), other consulting partners, and the cell tower applicant cannot reach agreement on either the definition of the "Area of Potential Effects" (APE) for the proposed undertaking, identification of historic properties within the APE, or the evaluation and mitigation of effects (both direct and visual) of the undertaking. In all these situations, the right of the Advisory Council on Historic Preservation (ACHP) to be consulted prior to any final decisions by the FCC should be spelled out clearly in the PA, and not just referenced in citations to the ACHP regulations. With broad public participation and adequate appeal safeguards, the PA can ensure that streamlining will not mean the erosion of historic property protection.

The PA should also reference a national policy goal encouraging applicants to construct disguised or minimized cell towers to avoid, minimize, or mitigate their impacts on historic properties and landscapes.

BACKGROUND:

Over the last ten years, and particularly in the last three, the CWPT and its predecessor organizations have permanently protected, through fee simple or conservation easement acquisition, a total of over 16,000 acres of high-priority Civil War battlefields in 19 states. Its land acquisition decisions are guided exclusively by the recommendations of the 1993 congressionally authorized Civil War Sites Advisory Commission (CWSAC). The Commission examined the 10,000 military actions making up the U.S. Civil War between 1861 and 1865, and concluded that 384 sites in 25 states were of such

significance to the outcome of the War, largely retaining their site integrity (having not been demolished by subsequent development) while remaining in an unprotected status, that Federal funding should be authorized to acquire these sites. The CWSAC also prioritized the 384 sites, with Priority I areas recommended for immediate action due to their historical significance, degree of site integrity, and/or the development threat they faced.

Congress subsequently authorized a Civil War Battlefield Preservation Program (Public Law 107-359) to finance Interior Department matching grants to acquire hallowed ground based on the 1993 CWSAC recommendations and priorities for lands outside the boundaries of the National Park System. So, Congress has recognized as a national goal the preservation of the remaining, endangered Civil War battlefields.

With governmental and private sector partners, CWPT has to date used millions of dollars of Federal taxpayer money to buy acreage at these battlefields. The character and integrity of these sites, on which the CWSAC, Congress, and CWPT have based their decisions, must retain their basic historic quality and integrity; otherwise this Federal funding will have been misdirected or even wasted.

For most of these battlefields, this means retaining (or at least not further degrading) the rural, mid-19th century ambiance of the area, including the surrounding landscapes and view sheds. A cell tower, poorly designed or located, could have a devastating, negative effect on these battlefield surroundings and view sheds. For this reason, CWPT believes that the FCC, working with National Park Service and the ACHP, should make available to potential cell tower and other similar applicants the list and location of the 384 CWSAC sites. Many of these sites, but not all, are already either listed in the National Register of Historic Places or have been deemed eligible for such listing. Many of the sites that have not yet been deemed eligible probably would be if nominated.

SPECIFIC COMMENTS ON SECTIONS OF THE PROPOSED PA:

Definition of “Historic Places” -- Section II A. 8.

Similar to the Section’s current wording that the definition includes properties of traditional religious and cultural importance to Indian tribes that meet National Register criteria, the PA’s definition of historic places should be expanded to include the 384 sites identified by the CWSAC, with the FCC (working the National Park Service and the ACHP) making full information on these sites available to potential applicants.

Undertakings Excluded from Section 106 Review -- Section III A. 4. and A. 5

Because of the potential, adverse effects that a cell tower siting could have on the CWSAC’s priority sites, CWPT agrees with the comment of the Ohio SHPO that any excluded facility construction should have no structure 45 years or older within 400 feet of the proposed facility or, alternatively, a distance equal to the height of the proposed facility. Similarly, we agree with the comment of the National Conference of State

Historic Preservation Officers (NCSHPO) that Section III A. 5. be modified to allow an individual SHPO to “opt out” of the automatic exclusion for designated rights of way involving an Interstate Highway or active railroad corridor where historic properties, including Civil War battlefields, are likely to be present.

Finally, we are very concerned that only requiring a Section 106 review for certain proposed facilities 400 feet or less in height above the ground “within $\frac{3}{4}$ mile of and visible from a unit of the National Park System...or a National Historic Landmark” would erode existing Section 106 protection afforded historic battlefields outside the boundaries of the National Park System that are already listed in, or are deemed eligible for listing in, the National Register of Historic Places. We believe that the wording in the last part of Section III 5(3) should be therefore be revised to read:

- “(3) the proposed Facility lies within **one** mile of **or** is visible from a unit of the National Park System or other historic properties or structures that are listed in, or are eligible to be listed in, the National Register.”

In 1999, the Appalachian Trail Conference (ATC) negotiated a voluntary resolution with two cellular telecommunication associations to provide for early notification of potential cell tower construction near national scenic trails. The resolution, which CWPT understands has been successfully implemented, states in part that an applicant for cell tower construction within one mile of a national scenic trail will voluntarily notify the cognizant trail managing organization. Otherwise, we believe if the current PA wording is not changed, we will find that a facility of up to 400 feet in height above the ground (particular on a hill or mountain) and/or more than $\frac{3}{4}$ mile from a national park or historic battlefield (even though highly visible) will often have a very significant adverse visual or other impacts on historic properties and structures -- but with no Section 106 protection that is afforded them under current law.

Public Participation – Section V. B. and F.

CWPT believes that to balance the goals of streamlining and continued adequate Section 106 protection of historic properties under the proposed PA, the application process must be as open and transparent as possible, for the public as well as for applicants, State and local governments, and non-profit organizations. Therefore, in addition to the requirements already established in Section V. B., the PA should require that an applicant provide written notice of the planned undertaking to the FCC’s Telecommunications or Media Bureaus (depending on the type of facility involved), which in turn would post basic information and data about the undertaking on the FCC website.

In Section V. F., nationally recognized, non-profit organizations like the CWPT should be automatically entitled to be consulting parties in the Section 106 review of a proposed undertaking (identical to the treatment this section currently affords SHPOs and Indian tribes), and not leave that decision up to the applicant and a possible appeal to the FCC. At a minimum, we join with the NCSHPO and others to recommend that this section be amended to specify a period of time for public and local government comment and

response on any applicant or FCC decision related to the eligibility of a group to be officially considered as a consulting party.

Identification, Evaluation, and Assessment of Effects – Section VI. B. 2. a., B. 2. a. 2), B. 2. b., and C.

In Section VI. B. 2., the period of the year should be defined for determining the visual effects of the proposed facility, since the APE becomes the area from which the tower will be “visible”. The winter effects will usually be more dramatic than the summer effects given tree conditions in many areas of the U.S. However, this will vary in different parts of the country. Consequently, CWPT believes that the period should be designated as the time of year when the line on sight from the proposed facility is projected to be at its maximum.

In Section VI. B. 2. b., the PA should explicitly address the situation where a proposed cell tower may be sited beyond the mileage that would automatically define the APE but still be visible from the landmark (during the period of maximum visibility) due to its height or due to its lighting (whether or not this lighting is required by the FAA or another regulatory body), so that the landmark’s integrity and character are impaired.

Consequently, CWPT believes that for structures of 400 feet or less in height, the distance from the structure that defines the APE should be a minimum of one mile (not $\frac{1}{2}$ or $\frac{3}{4}$ mile). Further, we agree with the NCSHPO and the National Trust for Historic Preservation that for a proposed facility 1,000 feet and higher, the applicant must, in consultation with the appropriate SHPO(s), determine on an individual basis the APE for that facility in all cases.

In addition, we believe that any **lighted** towers with proposed heights of 400 feet or higher should also fall under this category where the APE must be individually defined.

In Section B. 2. c., again to ensure protection of historic properties is afforded full consideration, the FCC should be required to consult with the ACHP before making any decision concerning an alternative APE.

In Section C., there should be an explicit reference to the 1993 congressionally sanctioned Civil War Sites Advisory Commission list of 384 Civil War battlefields as “historic properties”.

Procedures – Section VII

This section makes references to various existing ACHP regulations about how to identify historic resources and adverse effects, and find ways to avoid, minimize or mitigate them. The bottom line is that before there is a final decision by the FCC on an application that the ACHP disagrees with, there is a required review and comment period afforded the Council. If the FCC should unilaterally terminate consultation among the parties involved, the head of the FCC must take into account the ACHP comments in

reaching the final decision. These procedural requirements should be spelled out in the PA, where otherwise there can be inferred an authority by the FCC to proceed on its own with no further outside consultation.

In particular, where the SHPO or other consulting parties disagree with the applicant either on determinations of no historic properties affected or on determinations of no adverse effect or of the degree of adverse effect, and the applicant submits the dispute to the FCC, it should be clear that the FCC is bound by the ACHP regulations calling for required review and comment periods being afforded the Council. That is only referenced in the current PA in Section VII. D. 5. for situations where the parties are unable to agree on mitigation measures.

Further, in Section VII. D. 3., the FCC should invite the participation of the Secretary of the Interior in situations where the undertaking would have an adverse effect on one of the CWSAC-listed battlefields.

CONCLUSION:

CWPT again thanks the FCC for being able to comment on the proposed PA. The thrust of our comments are meant to ensure that subsequent actions abutting or near CWPT-acquired property that has been permanently preserved through the leveraging of Federal and non-Federal dollars will not be adversely affected by subsequent Federally licensed or sanctioned development or facilities, thereby diminishing the investments in this property made by the taxpayers and our donors.

Please contact Jim Lighthizer, CWPT's president, at 202-367-1861 if there are comments or questions about our submission.